

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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JOSE R. PADILLA,

Plaintiff,

v.

DR. GARY MAIER, DR. DALIA SULIENE,  
DR. KURT SCHWEBKE, J. NICKEL  
and C.O. BITTLEMAN,

Defendants.  
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ORDER

11-cv-425-bbc

Plaintiff Jose Padilla is proceeding in this action on his claims that defendants Maier and Suliene failed to provide him proper health care for his mental and physical needs and that defendant Bittleman used excessive force against him in violation of the Eighth Amendment. Defendants have answered the complaint and a preliminary pretrial conference order was issued on August 5, 2011. Now plaintiff has filed a motion to dismiss defendant Bittleman and continue his lawsuit against defendants Maier and Suliene only.

When a motion for dismissal is filed after a defendant has filed an answer, Rule 41(a)(2) provides that the action may be dismissed by the plaintiff "only upon order of the court and upon such terms and conditions as the court deems proper." Because defendant Bittleman has been required to defend this action, I will grant plaintiff's motion for voluntary

dismissal of this defendant only on the condition that the dismissal is with prejudice, which means that plaintiff will be barred from bringing the excessive force claim in his current case in any future action, unless defendant Bittleman agrees to a dismissal without prejudice. If defendant Bittleman does not agree to a dismissal without prejudice, then plaintiff will have an opportunity to withdraw his motion.

#### ORDER

IT IS ORDERED that defendant Bittleman may have until August 31, 2011, in which to advise plaintiff and the court whether he agrees to dismissal of this action without prejudice. If defendant Bittleman does not agree to such a dismissal, plaintiff may have until September 2, 2011 in which to either (1) withdraw his motion for dismissal of defendant Bittleman or (2) advise the court that he has no objection to a dismissal of this defendant with prejudice. If, by September 2, 2011, plaintiff fails to request withdrawal of his motion to dismiss defendant Bittleman, defendant Bittleman will be dismissed from this case with prejudice.

Entered this 23d day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge